In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, A Minor by and through MRS. KAM WAI LAU, his guardian ad Litem, et al.,
PETITIONERS,

v.

ALAN H. NICHOLS, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY IN SUPPORT OF THE PETITIONERS

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Introduction

We present this brief in support of the petitioners with the consent of all parties pursuant to Supreme Court

Rule 42(1). Copies of the letters of consent are attached to our covering letter to the Clerk of this Court. We rely on the petitioners' treatment of this Court's jurisdiction, the questions presented for review, constitutional and statutory provisions involved and statement of the case.

The unreported order of the district court denying petitioners' motions for injunctive and declaratory relief and finding for respondents on the merits is found at petitioners' Record on Appeal pages 418-421 (App. ——). The opinion of the Court of Appeals affirming the district court's decision, District Judge Hill dissenting, is reported at 472 F.2d 909 (9th Cir. 1973). The unreported order of the Court of Appeals denying a request for *en banc* review, Judge Hufstedler dissenting and Judge Trask concurring, is found at petitioners' appendix (App. ——).

Interest of Amicus Curiae

The Center for Law and Education, Harvard University, was created jointly by the Harvard Law School and the Harvard Graduate School of Education in 1969. The Center is funded by the United States Office of Economic Opportunity to work in conjunction with local legal service offices and other attorneys to promote reform in American education by working in the area of social policy and the law, especially on behalf of the poor. The Center's attorneys have concentrated on problems in the following areas: resource allocation, within and between school districts; racial discrimination; federal programs; "ability grouping"; excluded children; and bilingual education. Center personnel have participated in litigation, including the preparation of several amicus briefs; done research and writing; drafted legislation; and negotiated with public

officials. The Center publishes a bulletin entitled *Inequality in Education.*

The Center has, during the past two years, become increasingly involved in the problems of minority children who because of their linguistic and cultural background are not receiving the benefits of education. The Center's concern has led to extensive participation by Center attorneys in drafting the Massachusetts Transitional Bilingual Education Act, Massachusetts Acts and Resolves, ch. 1005 (November 4, 1971). That legislation, the first state-wide compulsory bilingual education program ever enacted, provided for a transitional training period of education in the bilingual child's native language during which period the child would learn English language skills appropriate to his or her grade level. Center attorneys have also been extensively involved in litigation concerning the educational problems of non-English speaking children with one attorney devoting full time to the educational problems of American Indian children, and the Court of Appeals opinion in this case referred to the *amicus curiae* brief filed by the Center, 472 F.2d 909, 911, 914-15, 919.

The Center's work has given us experience in evaluating the constitutionality of educational practices. In addition, the Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which is material under governing legal principles. In this brief we present educational data bearing on the educational harm which plaintiffs now suffer as the result of the defendants' educational policies as well as a discussion of cases in the education law area which bear on this action.

Our recent sampling of neighborhood legal service offices indicates that over 20 such offices are presently actively involved in litigation concerning the educational

rights of non-English speaking poor children. This demonstrates that equal educational opportunities for non-English speaking children are a matter of substantial concern to the poor. Therefore, the filing of this brief permits the Center to present an argument on a matter substantially affecting the quality of education afforded the poor.

Summary of Argument

1. The Court of Appeals found that non-English speaking Chinese children who receive no special help in learning English are nonetheless receiving equal educational opportunities at the hands of the respondents. However, Congressional studies, the vast weight of expert educational opinion and respondents themselves have concluded that if a child cannot understand the language of instruction he is doomed to educational failure. Thus, this case is markedly different from *San Antonio Independent School District* v. *Rodriguez*, 93 S. Ct. 1278 (1973) where the plaintiffs received a minimum adequate education and asserted speculative and relative deprivations. Here the petitioners do not in any real sense receive educational opportunities equal to those of their English-speaking classmates and respondents must bear the responsibility for the situation since they have failed to employ any of the several available language instruction techniques which would aid the petitioners.

2. One element of the error below was an interpretation of educational opportunity which focused on tangibles, books, facilities, teachers and ignored the essence of the educational process — the ability to communicate, to question, to comprehend and express ideas. This Court in *Brown* v. *Board of Education*, 347 U.S. 483, *Sweatt* v. *Painter*, 339 U.S. 629, and *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 rejected any notion that educa-

tional opportunity could be limited to mere surface equality of facilities.

3. Even though we are a pluralistic society, discrimination against non-English speaking minority groups has long been part of our history. Thus religious and racial opprobrium has been crucial in determining whether languages other than English will be tolerated in public life. The Chinese are one such group who have been scorned, segregated and deprived of privileges on the basis of their language. Thus when a non-English speaking minority group is made to send its children to public schools which both reject the child's native language and refuse to teach him English, that group is suffering another form of language-based ethnic discrimination and that discrimination becomes "part of the educational message to be communicated." *Norwood* v. *Harrison*, 41 U.S. Law Wk. 5094, 5098 (June 25, 1973) and such a message of rejection itself has the effect of lowering the minority child's chances of success.

4. This Court in the recent voting rights case of *White* v. *Regester*, 41 U.S. Law Wk. 4885, 4889 (June 18, 1973) recognized the linguistic impediments to educational success which may be suffered by a minority group. Lower Federal courts have likewise granted relief to claims of denials of equal educational opportunities which were presented by linguistically excluded students. And while the intent to discriminate need not be shown when there is a discriminatory impact, respondents here have intentionally allocated resources and set priorities which deny petitioners the kinds of programs which respondents know are vital to petitioners.

5. The petitioners are members of a class marked by the "traditional indicia of suspectness", *Rodriguez*, *supra* at 1294 and hence in view of this Court's long history of strict scrutiny of classifications which burdened the Chi-

nese, the Court below should have applied the more rigorous standard of equal protection review. However, a system which withholds knowledge of English from those who need it most can not be justified as rationally related to any state objective articulated in this case. Thus, San Francisco rewards those who come from English-speaking homes while effectively excluding those who do not. No legitimate governmental objective is served by such a system which under any standard of review is arbitrary, invidious and a violation of the Fourteenth Amendment's Equal Protection Clause.

6. The Court below applied the wrong standard of review to petitioners' equal protection claim, *Rodriguez, supra* and misallocated the burden of proof in the face of a history of ethnic group discrimination, *Keyes* v. *School District No. 1, Denver, Colorado*, 41 U.S. Law Wk. 5002, 5008 (June 21, 1973). Yet a remand in light of those decisions would be improper a) because *Rodriguez* was considered and found inapplicable by a majority of the Court of Appeals on request for *en banc* review, b) because *Keyes* does not address the language issue directly and c) because of the need for swift relief. Therefore this Court should declare denial of language instruction a denial of equal educational opportunities to petitioners and remand to the district court for receipt of a plan from respondents whereby these denials will be corrected.

Argument

I. The Respondents Have Denied Petitioners the Equal Protection of the Laws by Effectively Excluding Them From Access to an Education.

A. *Petitioners Do Not Receive Educational Opportunities Equal To Those Received By Children From English-Speaking Homes.*

This case presents a challenge by 1800 Chinese-speaking pupils in the San Francisco public schools to a system of education which compels them to attend schools conducted in the English language but offers them no assistance in learning the language of instruction. As a result of the respondents' refusal to provide these Chinese pupils special instruction in English they suffer a very real exclusion from the educational process albeit their attendance in the classroom is compelled. Thus, while English-speaking students raise their hands and ask questions, the petitioners sit silent. And while both petitioners and their English-speaking classmates are given the same books, for the Chinese-speaking children the pages are as if blank; the print conveys nothing. For petitioners schooling consists neither of intelligible instruction nor communication with classmates, and education becomes "mere physical presence as audience to a strange play which they do not understand." *Lau* v. *Nichols*, 472 F.2d 909, 919 (9th Cir. 1973) (Hill, J. dissenting).

Thus at the outset it is well to note an important distinction between the obvious and overwhelming educational deprivations suffered by the petitioners and the harms envisaged by the plaintiffs in *San Antonio Independent School District* v. *Rodriguez*, 93 S. Ct. 1278 (1973) (hereinafter cited as *Rodriguez*). That case concerned the constitutional adequacy of the Texas school finance system. The system, known as a Minimum Foundation Program, was asserted by the state to provide "at least an adequate program of education". . . for "every child in every school district . . . ." *Rodriguez, supra* at 1292. Faced with a claim that the method of disbursing tax revenue somehow discriminated against poor school districts to the detriment of the education offered to children in those districts, the Court noted the relative nature of

the harm alleged and could find no proof that the Texas program did not in fact provide a minimally adequate education for all students. *Supra* at 1292, 1299.

In this case, however, petitioners assert that they in no sense receive a minimally adequate education. Indeed, they assert that, being unable to communicate or understand the language of instruction, their educational opportunities are wholly unequal to those of English-speaking children.

That children from non-English speaking language minority groups suffer grave deprivations of educational opportunity is a national tragedy of great proportion.[1]

Recently the United States Senate Select Committee on Equal Educational Opportunity completed three years of investigation into the way American public education serves minority group children. In its final report the Committee stated: "It is the conclusion of this committee that some of the most dramatic, wholesale failures of our public school systems occur among members of langauge minorities . . . [w]hat these conditions add up to is a conscious or unconscious policy of linguistic and cultural

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[1] The U. S. Department of Health, Education and Welfare has estimated that there may be five (5) million public school children in the country who speak a language other than English in their homes. U. S. Department of Health, Education and Welfare, "Draft: Five Year Plan, 1972-77: Bilingual Education Program" (August 24, 1971). Among those directly affected by the decision below are many of the approximately 740,000 Spanish surnamed students in Arizona, California, Idaho, Montana, Nevada, Oregon and Washington — or 37% of the total number of Spanish surnamed students in the United States. United States Commission on Civil Rights, *Mexican American Education Study* (April, 1971) p. 16. Also affected will be many of the 64,000 American Indian children in those states — approximately 33% of the total number of Indian students nationally. Report of the Committee on Labor and Public Welfare and Committee on Interior and Insular Affairs, S. Rep. No. 92-384, 92nd 1st Sess. (1971), at 23-24.

exclusion and alienation."[2] The Committee found that twenty-three percent of the total school enrollment in New York City is made up of Puerto Rican children. Yet in 1963 only 331 of 21,000 (1.6%) "academic" diplomas granted in New York went to such children.[3] In other cities the picture is no brighter. In Newark, for example, there were 7,800 Puerto Rican students in the public school system but only 96 survived to the twelfth grade while in Chicago the dropout rate among Puerto Rican students approached sixty percent.[4] Among Mexican-Americans the language barrier poses equally severe educational difficulties. Some fifty percent of this group never go past the eighth grade. In Texas, for instance, forty percent of the Spanish-speaking citizens are described as "functional illiterates."[5] Among Cherokee Indians the school dropout rate runs to seventy-five percent with illiteracy among adults at forty percent.[6]

The Senate Committee's findings of "linguistic and cultural exclusion and alienation" are amply supported by the weight of expert educational opinion and, indeed, by respondents themselves.[7] Thus the evidence indicates that

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[2] Report of the Select Committee on Equal Education Opportunity, S. Rep. No. 92-000, 92nd Cong., 2nd Sess. (1972), at 277.

[3] Hearings Before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2nd Sess., pt. 8, at 3726 (1970).

[4] *Id.* at 3685.

[5] *Id.* at Part 4, 2400.

[6] Report of the Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 501, 91st Cong., 1st Sess. (1969), at 19.

[7] [W]hen these [non-English-speaking Chinese] youngsters are placed in grade levels according to their age and are expected to compete with their English-speaking peers, they are frustrated by their inability to understand the regular classwork . . . . For [these] children, the lack of English means poor performance in school. The secondary student is almost inevitably doomed to be a dropout and become another unemployable in the ghetto. San Francisco Unified School District, *Pilot Program: Chinese Bilingual*, pages 3A-6A (May 15, 1969), Plaintiffs' Exhibit No. 5 ——, (App. ——).

verbal forms of communication in children evolve more slowly than actual understanding. The natural process is for a child first to develop understanding and then to form a concept. Then, when the child has formed the new category, he needs a name or label for it, and as he becomes older the child begins to use language at an accelerating rate for purposes of problem solving.[8] When ideas are being formed in one language, it is difficult to state them in another and "cognitive confusion," confusion in the child's understanding of the concepts and reasoning tasks at hand may develop. This confusion may lead to great frustration or anxiety and ultimately to a loss of interest in expressing ideas. When a school instructs in a second language before a child has developed adequate cognitive skills in his native language, the child may become a "non-lingual" whose functioning in both his native and a second language develops in only limited

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[8] See Vera P. John and Vivian M. Horner, *Early Childhood Bilingual Education* (Modern Language Association of America, 1971), 171; Joan T. Feely, "Teaching Non-English Speaking First Graders to Read," *Elementary English* (1970), 207; Anne Anastasi and Fernando A. Cordova, "Some Effects of Bilingualism Upon the Intelligence Test Performance of Puerto Rican Children in New York City," *The Journal of Educational Psychology*, Vol. XLIV (1953), 15, 16; Sheldon H. White, "Some General Outlines of the Matrix of Developmental Changes Between Five and Seven Years," *Bulletin of the Orton Society* (1970), 20, 41-57; John MacNamara, "Effects of Instruction in a Weaker Language," *The Journal of Social Issues*, Vol. XXIII (1967), 22, 132; Sheldon H. White, "Evidence for a Hierarchical Arrangement of Learning Processes," in L. P. Lipsett and C. C. Spiker, eds., *Advances in Child Development and Behavior*, Vol. II (New York: Academic Press, 1965); John MacNamara, "Cognitive Basis of Language Learning in Infants," *Psychological Review*, Vol. 79 (1972), 1; John A. Downing, "Children's Thoughts and Language in Learning to Read," Unpublished paper, ERIC, (1971); and generally Jean Piaget, *The Language and Thought of the Child* (London: Routledge and Kegan Paul, 1959) and Leo S. Vygotsky, *Thought and Language* (Cambridge: M.I.T. Press, 1962).

ways.[9] Moreover, the educational harms suffered by the non-English speaking child are not limited to his verbal abilities or comprehension of orally presented subject mat-

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[9] See John and Horner at 165-73; Feely at 207; Anastasi and Cordova at 3; C. Allen Tucker, "The Chinese Immigrant's Language Handicap: Its Extent and Its Effects," *Florida FL Reporter*, Vol. 7 (1969) 44; Miles V. Zintz, *Education Across Cultures* (Kendall Hunt, 1969), 142-3, 262, 267, 398; Northeast Conference on the Teaching of Foreign Languages, *The Challenge of Bilingualism*, Report of Working Committee II, in G. Reginald Bishop, Jr., ed., *Foreign Language Teaching: Challenges to the Profession* (1965) 77-8; Madorah F. Smith, "Measurement of Vocabularies of Young Bilingual Children in Both of the Languages Used," *The Journal of Genetic Psychology*, Vol. 74 (1949), 305-10; Ethel M. Barke and D. E. Williams, "A Further Study of the Comparative Intelligence of Children in Certain Bilingual and Monolingual Schools in South Wales," *The British Journal of Educational Psychology*, Vol. VIII (1938), 63; Theodore Andersson, "A New Focus on the Bilingual Child," *The Modern Language Journal*, Vol. XLIX (1965), 156-60; Chester C. Christian, Jr., "The Acculturation of the Bilingual Child," *The Modern Language Journal*, Vol. XLIX (1965), 163-64; David T. Hakes, "Psychological Aspects of Bilingualism," *The Modern Language Journal*, Vol. XLIX (1965) 220-27; Mildred V. Boyer, "Poverty and the Mother Tongue," *Educational Forum*, Vol. XXIX (1965), 290-96; George Perren, "New Languages and Younger Children," *English Language Teaching*, Vol. XXVI (1972), 229-238; Doris C. Ching, "Methods for the Bilingual Child," *Elementary English*, Vol. 42 (1965) 22-27; Patricia G. Adkins, "Deficiency in Comprehension in Non-Native Speakers," *TESOL Quarterly*, Vol. 3 (1969) 197. The broad conclusion that frustration and anxiety resulting from the language problem may in turn produce academic failure is in line with the finding that fear of academic failure in fact induces failure. See Eugene Burnstein, "Fear of Failure, Achievement Motivation, and Aspiring to Prestigeful Occupations," *Journal of Abnormal Psychology and Social Psychology*, Vol. 67 (1963) 189-193; Emery L. Cowen, Melvin Zax, Robert Klein, Louis D. Izzo and Mary Ann Trost, "The Relation of Anxiety in School Children to School Record, Achievement, and Behavioral Measures," *Child Development*, Vol. 36 (1965) 685-695; N. T. Feather, "The Relationship of Expectation of Success to Reported Probability, Task Structure, and Achievement Related Motivation," *Journal of Abnormal Psychology and Social Psychology*, Vol. 66 (1963) 231-238; R. S. Lazarus, J. Deese and Sonia F. Osler, "The Effects of Psychological Stress Upon Performance," *Psychological Bulletin*, Vol. 49 (1952) 293-317.

ter. Research indicates that development of reading skills will also be impaired when there is a mismatch between the literary learner's own spoken and written language and the spoken language that the teacher regards as the proper basis for the learner's expected literate responses.[10]

These educational experts have focused on several different methods of teaching non-English speaking youngsters.[11] Yet it is significant that no support could be found in the literature for simply allowing non-English speaking youngsters to sit, uncomprehending, in the classroom without making intensive efforts to minimize their language disabilities.[12] The reference in the opinion below to a dispute among the experts [13] cannot obscure the fact that petitioners are receiving no language instruction at this point, either by English as a Second Language, by bilingual education or by any other instructional method.

Moreover, the educational deprivations which any non-English speaking child suffers upon being thrust unaided into an English-only classroom are felt even more strongly when the child's home language is wholly unlike English. Among the characteristics of the Chinese language which make it remarkably dissimilar from English are the following: a) Chinese is a tone language, i.e., meaning depends largely upon pitch or tone; b) vowels occur in very strictly controlled consonant environments; c) there are

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[10] John Downing, *Comparative Reading* (MacMillan Company, 1973) 181 ff; Nancy Modiano, "National or Mother Language in Beginning Reading: A Comparative Study," *Research in the Teaching of English*, 2 (1968) 32-43.

[11] John B. Lum, "An Effectiveness Study of English as a Second Language (ESL) and Chinese Bilingual Methods," Unpublished paper, ERIC (1973).

[12] Indeed such efforts are crucial. See A. V. Overn and D. G. Stubbins "Scholastic Difficulties of the Children of Immigrants," *Journal of Educational Research*, Vol. 31 (1937) 278-280.

[13] *Lau* v. *Nichols*, *supra* at 917, fn. 17.

very few words or syllables that end with a consonant; d) there are no consonant clusters; e) there are no singular/plural distinctions for nouns in Chinese; f) Chinese verbs have only one form; g) word order cannot be manipulated for meaning change as English word order can; h) the written language is pictorial rather than phonic as in English.[14]

Finally, references to the "exploratory nature" of respondents' current efforts, *Lau* v. *Nichols*, *supra* at 918, should not lead this Court to conclude that there is anything novel or experimental in the educational proposition that non-English speaking children will do poorly in an English-language school unless given language instruction. Over sixty years ago a massive Congressional study on immigrant education reported that 82% of the Chinese-speaking students in the San Francisco public schools were educationally retarded.[15] At present there are nearly

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[14] See C. Allen Tucker, "The Chinese Immigrant's Language Handicap: Its Extent and Its Effects," *Florida FL Reporter*, Vol. 7 (1969) 44-45; An-Yan Tang Wang and Richard A. Earle, "Cultural Constraints in Teaching Chinese Students to Read English," *The Reading Teacher*, Vol. XXV (1972) 663-669; George S. C. Cheong, "Does English Overtax Our Human Energy," *Elementary English*, Vol. XLVII (1971) 56-58; Charles C. Fries and Yao Shen, *An Intensive Course in English for Chinese Students* (University of Michigan, 1946); Herbert Allen Giles, *China and the Chinese* (Columbia University Press, 1902) 3-36.

[15] Report of the Immigration Commission, Document Number 749, 61st Cong., 3d Sess. (1911) at Vol. V, 294. During this period the Constitution of New Mexico provided that: "The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils . . . and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students." Constitution of the State of New Mexico, Art. XII, section 8 (1912). Even earlier Colorado (1867), Louisiana (1879), Ohio (1840) and Michigan (1827) facilitated the non-English speaking child in his efforts to acquire comprehensible public education, see gen-

400 bilingual educational programs operating in 36 states, the District of Columbia, Guam, Puerto Rico, and the trust territories. These programs cover 32 languages and are funded by Federal, State, local and private sources.[16] Thus there is nothing novel about the type of denial of educational opportunity of which petitioners complain. Nor are respondents lacking in possible models to turn to were they of a mind to do so. Rather, respondents have taken the position that they have no responsibility to do anything to assist petitioners since petitioners' plight is, in the words of the opinion below, ". . . the result of deficiencies created by the appellants themselves in failing to learn the English language." *Lau* v. *Nichols, supra* at 917. We now turn to an examination of that responsibility.

B. *The Respondents Are Responsible For The Lack Of Equal Educational Opportunity Being Suffered By The Petitioners.*

1. The Decision Below Improperly Constricts This Court's Rulings in *Sweatt* v. *Painter,* 339 U.S. 629 (1950), *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950) and *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

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erally Heinz Kloss, *Das Volksgruppenrecht in den Vereinigten Staaten von Amerika,* Vol. I and II (Essen, 1940, 1942) 165, 369, 451, 527 and Table of English Excerpts 976-997 and Joshua A. Fishman, *Language Loyalty in the United States* (Mouton, 1966).

[16] Maria E. Brisk, *Directory of Bilingual Education Programs,* 1972-3, (Center for Applied Linguistics, 1973) (forthcoming). Among the many techniques in use are those developed in programs described in the U. S. Department of Health, Education and Welfare, *PREP Report No. 31, Early Childhood Programs for Non-English Speaking Children* (1972); U. S. Department of Health, Education and Welfare, *Model Programs — Compensatory Education Series* (1972); U. S. Department of Health, Education and Welfare, *Profiles in Quality Education* (1968).

In its discussion of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) the Court below has attributed to *Brown* a meaning so narrow as to gut that case of its logical essence. For the majority of the Court of Appeals panel, *Brown* meant only that state-enforced segregation was no longer to be allowed and hence in this case that ". . . the Equal Protection Clause extends no further than to provide [children who speak no English] . . . the same facilities, textbooks, teachers and curriculum as is provided to other children in the district." *Lau* v. *Nichols*, 472 F.2d 909, 916 (9th Cir. 1973).

Certainly one important basis for *Brown* was that compulsory racial separation is *per se* discriminatory against black people. This is so because "[s]egregation in public education is not reasonably related to any proper governmental objective . . ."[17] and thus imposes an arbitrary and invidious classification upon those subject to the segregation.

We believe, however, that the concept of equal educational opportunity as it has been developed in the decisions of this Court must also embrace any avoidable regimen of compulsory public education which by its nature denies to an identifiable ethnic minority group the same chances for classroom success as is afforded the majority of its students. To reach any other conclusion would be to ignore the very rationale which this Court used in reaching its decision in *Brown*.

In *Brown* the Court was faced with racial segregation of students in a setting in which ". . . the Negro and white schools involved have been equalized . . . with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Supra* at 492. Refusing to limit its inquiry to such "tangibles" the Court began its analysis with a discussion of earlier cases in which

[17] *Bolling* v. *Sharpe*, 347 U.S. 498, 500 (1954).

black graduate students had been denied equal educational opportunities. The Court said:

> In *Sweatt* v. *Painter, supra* [339 U.S. 629, 70 S. Ct. 850], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin* v. *Oklahoma State Regents, supra* [339 U.S. 637, 70 S. Ct. 853], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

The Court continued, "[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Supra* at 493. Thus the Court made it clear that any analysis of equal educational opportunity would look behind mere surface equality of facilities to the crucial, often intangible factors which go to make up the educational experience. When one racial group was systematically deprived of opportunities to enjoy such intangible factors the existence of some other equality of facilities was irrelevant. In *McLaurin* v. *Oklahoma State Regents, supra* the fact that the petitioner "uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned

in these rooms have any disadvantage of location" did not deter the Court from finding an Equal Protection denial in restrictions which impaired the petitioner's ability to study and engage in discussions. Here the mere surface equality of "facilities, textbooks, teachers and curriculum" cannot foreclose this Court from looking at the functional exclusion of these non-English speaking children and the absolute impairment of their ability to participate in their classroom society. Indeed, in many ways the deprivation of educational opportunity suffered by these petitioners is so severe that one could argue that *Sweatt* and *McLaurin* standing alone compel reversal of the Court below. In any event it is difficult to understand how one can read the reliance on those earlier cases in *Brown* and still apply an Equal Protection analysis which ignores the reality of inequality which the school system itself has recognized.[18]

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[18] Although the opinion below is the first instance we are aware of in which a lower Federal court has ignored the *Brown* findings of actual denial of equal educational opportunity, attempts to limit *Brown* are not unknown. In *U. S.* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967), the Court was faced with a construction of *Brown* which focused only on the harmful consequences of segregation. In making clear that segregation was *per se* prohibited by the Equal Protection clause the Court stated that: "The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision." *supra* at 871. Here the Court below has implicitly concluded that the finding of harmful consequences constituted no part of the basis for the *Brown* decision. Such a result would render meaningless the concept of equal educational opportunity for non-English speaking minority group children. And as the Court in *United States* v. *Jefferson County Board of Education*, *supra* refused to interpret *Brown* narrowly to the detriment of black children, this Court must not acquiesce in an even more cramped view of *Brown* as it affects other minority children.

2. *Deprivation of Language Instruction Is a Form of Ethnic Discrimination.*

In Part A we presented educational data which showed that non-English speaking children are without educational opportunities equal to those of their English-speaking classmates. While this may be said to be educationally true for any non-English speaking child, the inequality described reaches constitutionally prohibited dimensions when the linguistically excluded pupils belong to a minority group and the language of instruction thus withheld from them is that of the majority. Such a situation is underscored when the very group involved has suffered past language-based educational discrimination. For the historical record does not live up to Mr. Justice Powell's admonition that, "[I]n a pluralistic society such as ours it is essential that no racial minority feel demeaned or discriminated against . . . ." *Keyes* v. *School District No. 1, Denver, Colorado,* 41 U.S. Law Wk. 5002, 5017 (June 21, 1973) (Powell, J. concurring in part and dissenting in part).

Indeed, one writer has concluded that

> analysis of the record indicates that official acceptance or rejection of bilingualism in American schools is dependent upon whether the group involved is considered politically and socially acceptable . . . . If the group is in some way (usually because of race, color, or religion) viewed as irreconcilably alien to the prevailing concept of American culture, the United States has imposed harsh restrictions on its language practices; if not so viewed, study in the native language has gone largely unquestioned, or even encouraged.[19]

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[19] Arnold Liebowitz, *Educational Policy and Political Acceptance* (Center for Applied Linguistics, 1971).

Thus, for instance, while German teaching in the public schools flourished prior to the 1880's, nationalist reactions to rising immigration in the latter part of the 19th century led directly to efforts to ban the German language from the public schools. And with the anti-German feelings rampant during the First World War these efforts were vigorously and successfully renewed, leading ultimately to the pronouncement of this Court in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).[20] The political irony of barring the German language is especially sharp when we consider that the Continental Congress printed German editions of the Articles of Confederation at its own expense.[21]

Similar patterns of discrimination on the basis of language have occurred for Mexican-Americans in the Southwest and the Japanese, although perhaps no languages were as vigorously attacked as those of the American Indians.[22]

Of course, the petitioners here do not seek to question the use of English as the medium of instruction. But we think it clear that when a non-English speaking minority group is required to send its children to public schools which both exclude that group's native language and refuse to teach English to the non-comprehending minority children, that group is suffering a form of language-based discrimination.

In discussing another form of discrimination Chief Justice Burger has recently observed that: "[T]here is no reason to discriminate against students for reasons wholly

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[20] *Ibid.* at 18-19.

[21] Heinz Kloss, *Excerpts from the National Minority Laws of the United States of America* (East-West Center, 1966), 32.

[22] The Congressionally appointed Indian Peace Commission reported in 1868 that: ". . . in the difference of language today lies two-thirds of our trouble. Schools should be established which children should be required to attend; their barbarous dialects would be blotted out and the English language substituted." Quoted in Liebowitz at 67.

unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated." *Norwood* v. *Harrison*, 41 U.S. Law Wk. 5094, 5098 (June 25, 1973). Here, respondents' failure to allocate its attention and resources to the problem of 1800 non-comprehending Chinese-speaking students communicates a powerful message of educational discrimination. To the Chinese-speaking student the message is one of official neglect and rejection, of expected relegation to second-class education and non-participation in the life of the classroom.[23] And unfortunately that official neglect and rejection cannot help but shape the attitudes of the English-speaking children to their Chinese classmates.[24]

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[23] One writer has said of language minority groups, "[B]ecause their language is not considered valid in the larger society, they are made to feel that they are not personally adequate." Einar Haugen, "The Curse of Babel," *Daedalus*, Vol. 102 (1973). It seems to be the case that when a school has a low expectation of a child's success, the child will tend to do poorly. David Hughes, "An Experimental Investigation of the Effects of Pupil Responding and Teacher Reacting on Pupil Achievement," *American Educational Research Journal*, Vol. 10 (1973) 21-37, C. F. Palfrey, "Head Teachers' Expectations and their Pupils' Self-Concepts," *Educational Research*, Vol. 15 (1973) 123-127; W. W. Purkey, *Self-Concept and School Achievement* (Prentice-Hall, 1970). Compare Audrey James Schwartz, "A Comparative Study of Values and Achievement: Mexican-American and Anglo Youth," *Sociology of Education*, Vol. 44 (1971) 438-462.

[24] Moreover, the Chinese have long been "subjected to [such] a history of purposeful unequal treatment," *Rodriguez*, *supra* at 4415, treatment which burdened them in schools as well as business and which often focused on their language as the crucial aspect of their ethnicity enabling discriminatory burdens to be imposed.

"Historically, California provided for the establishment of separate schools for children of Chinese ancestry. That was the classic case of *de jure* segregation involved in *Brown* v. *Board of Education* . . ." *Lee* v. *Johnson*, 92 S. Ct. 14, 15 (1971) (Per Douglas, J. as Circuit Judge on application for stay). Thus, until repealed in 1947 (1947 Cal. Stats. c. 737 Section 1) the California Education Code provided for the racial separation of Chinese school children. As the California Supreme Court recently noted in *Castro* v. *State*, 85 Cal. Rptr. 20, 466 P.2d 244 (1970) fn. 11,

3. *Recent Cases Have Recognized the Effect of Language-Based Discrimination.*

The Constitutional implications of the kind of minority group language discrimination complained of have been recognized in recent cases. In *White* v. *Regester*, 41 U.S. Law Wk. 4885, 4889 (June 18, 1973), this Court upheld unanimously that part of the District Court's order which invalidated a multimember district plan because of its discriminatory impact upon Mexican-Americans. Mr. Justice White cited the finding of the District Court that

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prejudice against the Chinese in California has at times been rampant. In *People* v. *Hall*, 4 Cal. 399, 404-405 (1854) Chief Justice Murray described plaintiffs' race as follows:

> . . . a distinct people whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference . . .

Not only were the Chinese the object of legislative and judicial scorn, but early on, their language was seized upon by those who would impose disabilities upon them. For instance, the California Constitution of 1879 excluded Chinese immigrants from voting. When it later appeared that the children of the original Chinese immigrants might qualify as voters, the legislature passed an English-only literacy test as a voting requirement. See *Castro* v. *State*, *supra* at fn. 11.

And at the same time as statutes provided for the segregation of Chinese students in schools, other statutes provided for the segregation of their language. Indeed until the current version of the California Education Code Section 71 was enacted in 1967 the teaching by languages other than English was prohibited. See, e.g., 1943 California Education Code Section 8251: "All schools shall be taught in the English language." See generally Harold R. Isaacs, *Scratches on Our Minds* (John Day, 1958) for a description of American attitudes toward the Chinese. For a history of the segregation of the Chinese in the California public schools see Gunther Barth, *Bitter Strength: A History of the Chinese in the United States*, 1850-1970 (Harvard University Press, 1971), Charles C. Dobie, *San Francisco's Chinatown* (D. Appleton-Century Co., 1936), and Charles Wollenberg, *Ethnic Conflict in California History* (Tinnon-Brown, 1970).

Mexican-Americans "are reared in a subculture in which a dialect of Spanish is the primary language, providing permanent impediments to their educational and vocational advancement . . . ." *Supra* at 4884 fn. 13. The District Court had also observed that while no racial or other group has a constitutional right to be successful in its political activities, ". . . a state may not design a system that deprives such groups of a reasonable chance to be successful." *Graves* v. *Barnes*, 343 F. Supp. 704, 734 (W. D. Tex. 1972). The petitioners, here, are faced with similar language impediments and likewise assert that for them equal educational opportunity means that the respondents may not continue to operate a system which clearly deprives them of any reasonable chance to be successful in their educational pursuits.[25]

In *Serna* v. *Portales Municipal School Board*, 351 F. Supp. 1279 (D.N. Mex. 1972) and *United States* v. *Texas*, 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972) the courts found that bilingual language pro-

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[25] That San Francisco intentionally operates such a system is clear. In setting priorities and allocating resources respondents have failed to provide the language instruction which petitioners seek. The result has been the educationally impossible situation with which the petitioners are confronted. Respondents clearly acknowledge the result, see fn. 7, *supra* and Brief for Respondents In Opposition To Petition For Writ of Certiorari at 7, but insist that they have no obligation to design a system of education which would ameliorate the harmful effects of the system which they themselves have designed and currently operate. "When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission." *Davis* v. *School District of City of Pontiac*, 309 F. Supp. 734, 741 (E. D. Mich., 1970), *affirmed*, 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971). Mr. Justice Stewart has stated that a state's actions in this context will be judged by its "purpose or effect." *San Antonio Independent School District* v. *Rodriguez*, 41 U.S. Law Wk. 4407, 4425 (1973). (Concurring opinion of Mr. Justice Stewart) (emphasis added).

grams were necessary to overcome the educational deprivations of Spanish-speaking Mexican-American youngsters. And in *Guadalupe Organization* v. *Tempe Elementary School District No. 3*, Civ. No. 71-435 Phx. (D. Ariz. 1972) and *Diana* v. *State Board of Education*, Civil Action No. C-1037 RFP (N.D. Cal. 1970) the courts adopted as orders agreements reached to alleviate the discriminatory practice of assigning Spanish-speaking students to classes for the mentally retarded on the basis of examinations conducted in English.

II. Respondents' Refusal to Provide Language Instruction to Chinese-Speaking Students Is Arbitrary and Invidious Discrimination Prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The petitioners have urged this Court that they are members of a class marked by the "traditional indicia of suspectness"[26] and hence that special scrutiny should be used in analyzing their treatment by the school district. We agree with that proposition. For nearly one hundred years this Court has shown a willingness to scrutinize closely laws which impinged on Chinese immigrants and citizens. *Yick Wo* v. *Hopkins*, 118 U.S. 336 (1886), including laws which operated on the basis of language. For instance, in *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500 (1926), a Philippines ordinance required the keeping of business account books in English, Spanish, or a local dialect. Despite the obvious usefulness of the ordinance in assisting local tax collection and auditing, the Court focused on the discriminatory impact which the ordinance had on Chinese merchants, an impact which was found to deny them Equal Protection of the laws. At this late date

[26] *Rodriguez, supra* at 1294.

there can be little room to doubt that classifications which discriminate against the Chinese are inherently suspect.

However, even under the less exacting "rational purpose" test respondents' treatment of the petitioners fails to pass constitutional muster. As this test has been recently expressed, the question is whether the difference in treatment "bears a rational relationship to a state objective that is sought to be advanced . . . ." *Reed* v. *Reed*, 404 U.S. 71 (1971); *Weber* v. *Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *James* v. *Strange*, 407 U.S. 128 (1972). Certainly the deprivation here bears no rational relationship to "the educational and socializing purposes for which public schools were established." *Lau* v. *Nichols, supra* at 916. For it is not the use of English as the language of instruction which discriminates against petitioners but rather respondents' refusal to provide language instruction to teach them English.

Respondents' course of action makes sense only if their purpose is to limit the teaching of English and other subjects to those students who come from English-speaking homes. If that is their purpose, a purpose akin to rewarding pupils fortunate enough to have English-speaking parents, then refusing petitioners the instruction which would enable them to master English is understandable. However, not only must the state's actions be rationally related to its purpose but, even more fundamentally, that purpose must be a permissible one. *Weber* v. *Aetna Casualty & Surety Company, supra, Rodriguez, supra* at 1302; see also *United States Department of Agriculture* v. *Moreno*, 41 U.S. Law Wk. 5105 (June 25, 1973). To discriminate so grossly in favor of the English-speaking children could hardly be a legitimate state purpose.

The only other "justifications" which the Court below

may have found are those of limited resources and the exploratory nature of the respondents' language instruction program. As for the latter, we have already discussed the uncontroverted fact that the 1800 non-English speaking Chinese students in petitioners' class are receiving *no* special instruction by *any* of the methods of language instruction which are possible. And respondents have never denied the consequences of that non-program.[27] And as for the limited nature of the district's financial resources, that cannot be a justification for granting comprehensible education to one ethnic group while denying it to another.[28]

Finally, the respondents may be arguing that they treat all students exactly alike by intentionally ignoring the petitioners' inability to speak English. However, the application of a single "equal" standard to "unequal" individuals makes sense only insofar as the basis for applying the standard is a common characteristic of those individuals rationally related to the state's objective. Here mere physical ability to sit in a classroom seat together with English-speaking pupils is used as the basis for forcing petitioners to submit to teaching which they cannot possibly understand. Unless the purpose of education is somehow reduced to detaining petitioners for a certain number of hours each day in a classroom, the application to them of teaching geared to children who already speak English is irrational, arbitrary and invidious classification.

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[27] See, e.g., fn. 7.

[28] "The State must provide . . . it as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents of University of Oklahoma*, 332 U.S. 631, 632 (1948); ". . . all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class . . . ." *Cumming* v. *County Board of Education*, 175 U.S. 528 (1899).

Conclusion

At the time this case was before the Court of Appeals, this Court had not yet reached its decisions in *Rodriguez, supra* and *Keyes, supra*. The Court below appears to have used the wrong standard for Equal Protection review in a case involving a traditionally suspect class, *Rodriguez, supra* at 1294. Furthermore, the Court in *Lau* v. *Nichols, supra* at 914 appears to have improperly allocated the burden of proof in cases involving historical ethnic group discrimination, *Keyes, supra* at 5008.[29] Thus it would appear that it is San Francisco's burden to prove that it is not discriminating against Chinese-speaking students when it withholds from them the language instruction which it knows is necessary for those students' full participation in classroom life.

However, we would urge that a remand to the Court below for consideration of *Keyes* and *Rodriguez* would be inappropriate at this time. We take this position for three reasons. First, although *Rodriguez* was not decided at the time of the panel decision, *Rodriguez* was in fact considered by the full Court of Appeals on the request of a member of that court for a reconsideration of the case *en banc*. *Lau* v. *Nichols* (9th Cir. June 18, 1973) (request for *en banc* review). A majority of the Court of Appeals rejected that request and apparently felt that "little comfort for the dissent may be found in *San Antonio Independent School District* v. *Rodriguez* . . . ." (Trask, J. and Wright, J. specially concurring in the rejection of *en banc* consideration).

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[29] "In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions . . . . We reject any suggestion that remoteness in time has any relevance to the issue of intent." *Keyes* v. *School District No. 1, Denver, Colorado, supra* at 5008.

Second, the decision in *Keyes* does not address itself to the issue of language-based ethnic discrimination involved herein. Thus, although the Court below did refer to this Court's impending decision in *Keyes*,[30] there is nothing in *Keyes* directly addressing the *Lau* court's contention that: "appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district . . . . The classification claimed invidious is not the result of laws enacted by the State . . . but the result of deficiencies created by the appellants themselves in failing to learn the English language." *Supra* at 916-917.

Third, the complaint in this case was filed in March of 1970. By the time this Court hears the case we will be well into the 1973-74 school year. The need for promptly remedying denials of equal educational opportunity is manifest and need not be stressed to this Court.

Thus, we believe that this Court should give clear guidance to respondents and the Courts below on the question of language-based denials of equal educational opportunity.

We submit that this Court should:

(1) declare that the refusal of San Francisco to provide language instruction to its Chinese-speaking pupils so as to enable petitioners to participate in the educational process contravenes the Equal Protection Clause of the Fourteenth Amendment.

(2) remand the case to the district court for consideration, on an expedited basis, of a plan to be presented by the respondents which would outline the nature of respondents' intended efforts to alleviate the handicap which respondents have placed on petitioners by using English as the sole medium of instruction while refusing to pro-

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[30] *Lau* v. *Nichols*, *supra* at 913, fn. 8.

vide instruction which would enable petitioners to understand English.

Respectfully submitted,

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